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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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No. PD-0207-18

In the
Texas Court of Criminal Appeals

FILED
COURT OF CRIMINAL APPEALS
7/13/2018
DEANA WILLIAMSON, CLERK

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No. 01-16-00434-CR
In the Court of Appeals
For the First District of Texas

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No. 1472750
In the 338th District Court
Of Harris County, Texas

———————♦———————

DAMON ORLANDO MILTON
Appellant
V.
THE STATE OF TEXAS
Appellee

———————♦———————

APPELLANT'S BRIEF ON DISCRETIONARY REVIEW

———————♦———————

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ORAL ARGUMENT IS REQUESTED

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 38.1(a), a complete list of the names of all interested parties is provided below.

Trial Judge:	Honorable Wayne Mallia, Presiding Judge
Appellant:	Damon Orlando Milton #02066682 McConnell Unit 3001 S. Emily Drive Beeville, Texas 78102
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Appellate Counsel for the State:	Kim Ogg, Daniel McCrory &/or Eric Kugler Harris County District Attorney's Office 1201 Franklin, Suite 600 Houston, Texas 77002 Stacey M. Soule State Prosecuting Attorney P.O. Box 13046 Austin, Texas 78711
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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

RULES

TO THE HONORABLE TEXAS COURT OF CRIMINAL APPEALS:

STATEMENT OF THE CASE

On September 14, 2015, Appellant was charged by indictment with robbery. (CR 11).[1] The indictment alleged that Appellant had two prior felony convictions. (CR 11). A jury found Appellant guilty of the charged offense and sentenced him to 50 years confinement in the Texas Department of Corrections—Institutional Division. (CR 58, 68, 74-76; 4RR 182; 5RR 76).[2] On May 19, 2016, Appellant filed notice of appeal, and the trial court certified his right to appeal. (CR 77, 79). On June 17, 2016, Appellant filed a motion for new trial. (Supp. CR 3-16). The motion for new trial was overruled by operation of law on August 3, 2016. (CR 3).

The Court of Appeals for the First District of Texas affirmed Appellant's conviction in *Damon Orlando Milton v. State of Texas*, No. 01-16-00434-CR, 2017 WL 3633570 (Tex. App.--Houston [1st Dist.], Aug. 24, 2017, pet. granted). A motion for rehearing and en banc reconsideration were filed on September 25, 2017. On January 23, 2018, the First Court of Appeals panel denied Appellant's motion for rehearing, and the First Court en banc denied the motion for reconsideration with Justice Terry Jennings and Justice Jane Bland issuing dissenting opinions in *Damon*

[1] The Clerk's Record on appeal is designated "CR" followed by page number.

[2] The Reporter's Record on appeal is designated by volume number, followed by "RR," followed by page number.

Orlando Milton v. State of Texas, No. 01-16-00434-CR, --- S.W.3d ---, 2018 WL 505192 (Tex. App.--Houston [1st Dist.], Jan. 23, 2018, pet. granted).

On April 2, 2018, Appellant petitioned the Texas Court of Criminal Appeals for discretionary review regarding the first point of error in his brief. On June 13, 2018, the Texas Court of Criminal Appeals granted Appellant's petition and request for oral argument.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 38.1(e), Appellant requests oral argument because it would assist the Court in reaching its decision and counsel in presenting its arguments.

GROUND FOR REVIEW

Did the Court of Appeals error in holding the trial court did not abuse its discretion in allowing the State to play a video of a lion attempting to maul an infant during its closing arguments?

STATEMENT OF FACTS

On June 22, 3015, LaSondra Robertson ("Robertson") was working as a cashier at CVS. (4RR 17-18). She was "scanning her customers" when a guy, she identified as Appellant, came in and began looking around the store. (4RR 19). He walked around for 10 to 15 minutes. (4RR 19, 23). During this time she was not concerned about him, as he was acting like other customers. (4RR 31-32). He placed some items on the countertop, which she scanned and placed into a bag. (4RR 32). He did not pay for the items, which totaled $17.53. (4RR 109). He then leaned over the counter and stated, "This is a stick up, give me whatever is in the register, do not try anything, or I will kill you." (4RR 20). He told her he had a weapon. (4RR 20). He never displayed or reached for a weapon. (4RR 34, 36-37). Robertson felt nervous, threatened, and scared for her life. (4RR 20). She began placing money from the register in a bag, and he reached over and grabbed the bag. (4RR 21). Expect for when he reached and grabbed the bag, his hands remained on the countertop during the interaction. (4RR 33-34). The bag of unpaid merchandise included four beers, starburst, and chips. (4RR 21). He placed the cash in his pocket, and the coins were placed by Robertson into a bag. (4RR 21). She then called her manager, who called 911. (4RR 22).

Robertson provided a description of the individual to Austin Huckabee, ("Huckabee") a Houston Police Officer. (4RR 28, 114). Around 8:20 p.m. on June

22, 2015, Huckabee was dispatched to a robbery at the CVS. (4RR 113-14). Huckabee spoke briefly to Robertson, then put out the description of the suspect over the radio, and he left to look for the suspect. (4RR 114, 116-17). Approximately a third of a mile away, he observed Appellant by a KFC restaurant. (4RR 117-18). Huckabee radioed back to the other officers for clarification regarding the shirt worn by the suspect. (4RR 119). Huckabee detained Appellant. (4RR 119). He searched Appellant and his belongings, and no weapon was found. (4RR 120-22). He did locate a "wad" of "American cash" in Appellant's front pocket. (4RR 121, 144). In a backpack, along with dirty clothing, flip flops, deodorant, razors, and a toothbrush, Huckabee located two CVS plastic bags containing grocery items, beer, and snacks. (4RR 121, 147). A third CVS plastic bag contained loose change and rolled coins. (4RR 121). The outer pocket of the backpack contained a pair of eyeglasses. (4RR 122). Papers with Appellant's name on them were located in the backpack. (4RR 122, 126-124).

Appellant was brought back to the CVS. (4RR 29). The backpack was placed in the front seat of the patrol car. (4RR 130). When they arrived at the CVS, Huckabee removed the backpack from his patrol vehicle, and he laid the items in it on the top of his patrol vehicle. (4RR 130, 155-56). Then the police conducted a "show-up" of Appellant, who was standing next to the patrol vehicle when Robertson identified him. (4RR 130-31, 157).

Christy Inocencio ("Inocencio"), a Houston Police Officer, also responded to the CVS. (4RR 82-84). She spoke with Robertson, who, at the time, told her that she was afraid she would get hurt because she thought he had a weapon. (4RR 103). Robertson never told her that the man stated he was going to kill her. (4RR 102).

SUMMARY OF THE ARGUMENT

The Court of Appeals erred in holding the trial court did not abuse its discretion in allowing the State to play a video of a lion attempting to maul an infant during its closing argument.

ARGUMENT

In Appellant's original brief, the first issue presented was whether "the trial court abused its discretion in allowing the State to play a video, not admitted into evidence or admitted for demonstrative purposes during the trial, during its closing argument in the punishment phase of trial." (Appellant's Brief, pages 7-14).

The panel opinion found that the State "beginning its closing argument in the punishment phase by playing, over appellant's objection, a video clip of a lion aggressively trying to gain access to a baby that was protected by a glass wall" and "intimating that keeping appellant confined in prison protected society just as the glass wall protected the child from the lion" was a "response to the theme of appellant's closing argument, i.e., that appellant has paid for his crimes and should be given a lighter sentence and another chance," and that the analogy between the glass being necessary to restrain the lion and jail being necessary to restrain appellant was a plea for law enforcement and protection of the community in light of the sheer volume of appellant's prior offenses." *See Milton*, 2017 WL 3633570 at *13-15.

The panel's decision is incorrect for two reasons. First, the opinion failed to address Appellant's point of error – that the *playing of the video* was error, rather than only the actual argument. Second, that the *playing of the video* was a proper plea for law enforcement and/or response to Appellant's closing argument. Both of these reasons are addressed in dissenting opinions from the First Court of Appeals. *See Milton*, 2018 WL 505192 at *1-11.

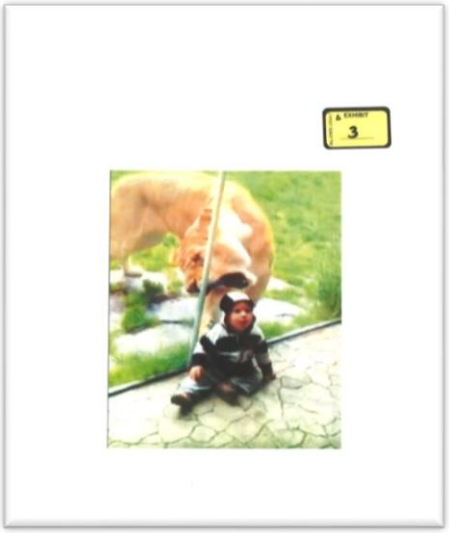
Failure to Address Appellant's Point of Error

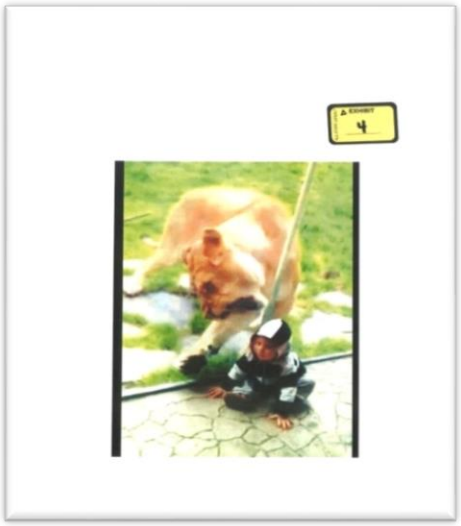
The panel decision is not responsive to Appellant's point of error that the trial court erred in allowing *the video*, not admitted into evidence or admitted for demonstrative purposes during trial, to be played. Both the point of error in Appellant's brief and Appellant's reply brief focus on the fact that the point of error is regarding the *video* being played. The point of error focused on the fact that the *video* was irrelevant and prejudicial to Appellant and the trial court erred in allowing it to be played. Justice Bland points this out in her dissent. She states that the video clip was "not evidence in the case" and "injected facts from outside the trial record for the purpose of increasing the defendant's punishment." *Id.* at *9. "The complained-of conduct was not the argument of counsel at all – it was a video clip played before the jury during the State's closing argument." *Id*. at *10. She further discusses, with citations, that a "brief allusion to something outside the record to make a metaphorical plea for law enforcement is not viscerally the same as

introducing facts from outside the record in the form of a video clip like this one." *Id*. The issue not addressed was whether or not the trial court abused its discretion in allowing the State to *play the video*, not admitted into evidence or admitted for demonstrative purposes during the trial, during its closing argument in the punishment phase of trial.

Prior to the State's closing argument during the punishment phase of trial, Appellant's trial attorney objected to the State using a *video* during their closing argument. (5RR 55-56). She argued to the trial court that the *video* was highly prejudicial and irrelevant. (5RR 55-56). The *video* depicts an infant, dressed in a black and white striped suit, sitting on the ground at what appears to be a zoo. (MNT 5; Defense Exhibit 2).[3] A glass wall is behind the child. (MNT 5; Defense Exhibit 2). On the other side of the glass wall is a female lion, who is viciously attempting to gain access to the child by scratching, pawing, and biting at the child. (MNT 5; Defense Exhibit 2).

[3] The record of the motion for new trial hearing is designated by "MNT" followed by page or exhibit number. The video may also be accessed by searching "lion tries to eat baby part 1" in YouTube. https://www.youtube.com/watch?v=6fbahS7VSFs





The video was not admitted into evidence during the trial; was not relevant as it is not a video of anything associated with the alleged offense or evidence in the case; was not admitted during the trial for demonstrative purposes in assisting a witness testify; and portrayed images that were highly prejudicial and inflammatory. The panel's opinion failed to address that a *video*, with visual images and audio, not admitted was permitted, over Appellant's objection, to be played for the jury during closing argument. Justice Bland states that the "video presented facts outside the

record and would never have been admitted into evidence" and concluded that the "trial court erred in allowing its admission during closing argument." *See Milton*, 2018 WL 505192 at *10. She is correct. Had the State sought to admit the video into evidence during the trial, the trial court would have erred in the admission. Appellant's trial attorney objected to the State using a video, and she argued to the trial court that the video was highly prejudicial and irrelevant. (5RR 55-56).

The State asserted that the purpose of the video was to demonstrate that if someone doesn't have opportunity then their desires do not matter, as an example, the lion does not have the opportunity to hurt the baby, so the lion's desire does not matter. (5RR 56-57). The State specifically told the trial court that it did not intend to "compare the defendant to the lion, or society to the baby, no comparisons like that." (5RR 56). The trial court overruled the defense objection, and allowed the video to be played during the State's closing argument. (5RR 57, 68).

A trial court's decision to allow evidence over objection is evaluated under an abuse of discretion standard. *Zuliani v. State*, 97 S.W.3d 580, 595 (Tex. Crim. App. 2003). A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992). Here, the trial court abused its discretion in allowing the State to play a video of a lion attempting to attack an infant during closing argument. The video was not admitted into evidence during the trial; was not relevant as it is not a video of

anything associated with the alleged offense or evidence in the case; was not admitted during the trial for demonstrative purposes in assisting a witness testify; and portrayed images that were highly prejudicial and inflammatory.

Under Rule 401, evidence is relevant if it makes the existence of a fact that is of consequence to the determination of the action more probable than it would be without the evidence. TEX. RULE EVID. 401; *see also Moses v. State*, 105 S.W.3d 622 (Tex. Crim. App. 2003). This trial involved allegations of a robbery at a CVS store. There were no accusations regarding infants or lions. The video was played during the punishment phase of trial, and there were no allegations during that phase that involved a lion or an infant. Accordingly, a video of a lion attempting to attack, maul, and presumably eat an infant was irrelevant as the video did not make the existence of a fact of consequence in the determination of Appellant's punishment more probable than without the video, and it should not have been played in front of the jury. *See* TEX. RULE EVID. 402. (Irrelevant evidence is not admissible).

Further, assuming the video was relevant, the trial court should have excluded it pursuant to Texas Rule of Evidence 403. The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice. *See* TEX. RULE EVID. 403. When undertaking a Rule 403 analysis and as applied here, the court must balance (1) the inherent probative force of the State's use of the video during closing argument along with (2) the State's need for the video against (3) any

tendency of the video to suggest a punishment decision on an improper basis, (4) any tendency of the video to confuse or distract the jury from the main issues, (5) any tendency of the video to be given undue weight by the jury that has not been equipped to evaluate the probative force of the video, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *See Gigliobianco v. State*, 201 S.W.3d 637, 641-42 (Tex. Crim. App. 2006).

The video had no inherent probative force during closing argument as it portrayed material unassociated with the case at hand. Further, the state's need for the video was low. Appellant was facing a sentence of 25 years to life in prison, and the jury had before it evidence of an extraneous robbery, that he had multiple prior convictions of robbery, and that he was on parole.

Rather, the video suggested a punishment on an improper basis. Despite the prosecutor's assurances to the trial court that he was ***not*** going to equate the lion to Appellant and the infant to society, he did exactly that.[4] Specifically,

> That lion was cute, and it was laughable, and it was funny because he's behind that piece of glass. That motive of that lion is never changing, never changing. It's enate (sic). Given the opportunity, remove that glass, it's not (sic) longer funny, it's a tragedy. That's what's going to happen, that's a tragedy. That's what (sic) going on with this case.

[4] "I'm not going to compare the defendant to the lion, or society to the baby, no comparisons like that." (5RR 56).

> In a vacuum, that resume right there, a sterile courtroom, it's almost laughable because we know he's such a bad guy. It's almost laughable, just like that lion, you're laughing at that lion because he's behind that piece of glass. Nothing funny about that lion when he's outside that piece of glass, that's a tragedy. Nothing funny when Damon Milton is outside of prison, that's a tragedy. (5RR 71-72).

The prosecutor specifically compared the lion and Damon Milton, and implicitly compared society to the baby in his closing argument. His use of the video was to compare Appellant's presence out of prison to that of a lion that would be mauling an infant but for a piece of glass. This suggests to the jury an improper basis for determining Appellant's punishment.

The video also had a strong tendency to distract the jury from the main issue of deciding Appellant's punishment. As stated by the prosecutor after he played the video, "I know you're thinking, that was weird, what was that about?" (5RR 68). The video obviously has nothing to do with the trial or the issue of punishment. The prosecutor argued that video was used in demonstrating a "motive, plus opportunity, and that equals behavior" theme. (5RR 69-70). And he assured the judge that he did not intend to draw any comparisons between the lion video and Appellant. (5RR 56). But then, he did.[5] This video distracted the jury from the issue of deciding

[5] It should be noted that this issue was raised in the motion for new trial. The judge who heard the motion for new trial was not the judge who heard the trial. (MNT 7). At the time of the motion for new trial hearing, due to the short amount of time allowed for the hearing to be heard, the transcript was not available to the parties or the court. (MNT 11). In response to the assertion that the State

Appellant's punishment on legally admissible evidence rather focusing its attention to the possibility of Appellant not being in prison to that of a lion mauling a child. (5RR 71-72).

Further, the video had a large tendency to be given undue weight by the jury that was not equipped to evaluate the probative force of the video. Because the video was played during the State's closing argument, the jury did not have any tools to assist it in evaluating the video. For instance, if it had been admitted during trial, the court could have given an instruction to the jury as to how they were to consider the video during deliberations. Rather, the jurors were told by the State to give the video serious weight in determining the verdict. Specifically, "…that 30 second clip is *exactly* what this punishment phase is about" and "…that video has *everything* to do with this case…" (5RR 68, 72)(emphasis added). They were told repeatedly during the State's closing argument that the video was what the case was about, and therefore, the tendency is that it was given undue weight by the jury.

Lastly, the video was repetitive of the State's argument. The video was unnecessary for the prosecutor to make his "motive, plus opportunity, and that equals behavior" theme. He did it initially in his descriptions of his equation, and he did it again in a hypothetical he gave to the jury about wanting to have Chick-fil-A on a

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used the video to compare Appellant to the lion and society to the infant, the prosecutor told the court that the representation of his closing argument in such a manner was "very inaccurate, and it is disingenuous. That's not what happened in this case."(MNT 10-11).

Sunday. (5RR 69). The admission of the video was merely a more highly prejudicial repeat of the same verbal arguments.

Accordingly, the *video* should have been excluded. The trial court erred when it allowed the *video* of a lion attempting to maul an infant to be played during the State's closing argument during the punishment phase of trial. The majority's opinion fails to address the admission of the *video* to the jury; and, this Court should hold that the allowing of the video to be played was error.

Response to Closing Argument and Proper Plea for Law Enforcement

Further, the majority's opinion found that argument related to the video, was a proper plea for law enforcement and a response to Appellant's trial counsel's closing argument. *Milton*, 2017 WL 3633570 at *14. As it relates to a proper response to Appellant's closing argument, the panel's opinion does not comport with the reality of what occurred in the trial court. Specifically, the State, *prior to defense giving their closing argument*, sought permission, over trial counsel's objection, to play the video. Therefore, the State sought to play the video and make the argument **regardless** of arguments made by Appellant's trial counsel. The State was going to make the argument that Appellant was the lion and that society was the baby and that a lengthy sentence is necessary to protect society from Appellant by playing the video **regardless** of what Appellant's trial counsel argued during her closing argument. It was to be part of the theme of his closing argument. It is more probable

that, knowing the trial court allowed the State to make the closing argument by playing a video of a lion attempting to maul an infant she felt the need argue against it during her closing argument knowing the video would be prejudicial to her client.

Further, the *playing of the video* was not necessary for the State to make a plea for law enforcement or "respond to Appellant's closing argument." The trial prosecutor claimed that the video was used to make his "motive, plus opportunity, and that equals behavior" theme. (5RR 57). However, he was able to make that same argument with a poster board "in addition" to the video. (MNT 11). He had a "visual aid" where "behavior and motive equals action" was written on a board. (MNT 11). He was also able to verbally describe a scenario of someone wanting to eat at a restaurant that was closed on a Sunday without having to *play* a video of someone actually going to and learning that a restaurant is closed. The *video* of a lion trying to maul an infant is not a proper plea for law enforcement nor is it a response to Appellant's trial counsel's argument, especially when it is pre-"admitted" prior to *any* closing arguments being given.

As noted by the majority opinion of this Court, the "appropriateness of the [comparisons of defendants to predatory animals] in this case is tenuous given the nature of the crime." *Milton*, 2017 WL 3633570 at *14. If just the verbal argument comparing Appellant to a vicious lion attempting to maul an infant is "tenuous given

the nature of the crime," the *playing of the video* was certainly unnecessary and improper.

A prosecutor may use colorful speech to convey the idea that the defendant will recommit the crime and may place upon the jury the responsibility to prevent the crime through punishment argument; but, here, the video exceeded "speech." Not only did the State use "colorful speech" to describe a defendant as a predatory animal that attempts to maul infants if not restrained, it played a *video* to convey the idea. It is one thing to verbally argue and describe something, and it is a whole different matter to use ***unrelated*** *video* footage during closing arguments to convey a message. The video was not "colorful speech" by the State as a plea for law enforcement nor was it a "response" to Appellant's closing argument as it was brought up and ruled on ***prior*** to Appellant's closing argument. Rather, it was a *video*, not admitted into evidence that contained both visual and audio statements unrelated to the case, played for the jury during closing argument. Then, in direct contradiction to the assurances given to the trial court prior to closing argument, the prosecutor specifically compared Appellant to the lion and implicitly compared society to the infant in the video. The trial court abused its discretion in allowing the video to be played during closing arguments, and the court of appeals majority's decision is incorrect.

Justice Jennings, in his dissent, discusses at length why the video's admission was not a proper plea for law enforcement. *See Milton*, 2018 WL 505192 at *1-9. He points out, which the majority opinion does not, that the nature of the offense was not violent and neither are Appellant's prior convictions. *Id*. at *5-6. Because the playing of the video was improper, this Court should find the playing of the video was error. Not doing so, will lead to prosecutors continuing this type of conduct. They could play videos footage, not admitted into evidence, to argue for convictions and for increased punishment. Likewise, defense attorneys could play video footage of individuals wrongly convicted being released from prison to convey their theory of a case in closing argument. The courtroom is simply not a place for the State of Texas to play videos, unrelated to the case and not admitted into evidence, during their closing arguments. Allowing it to occur is a slippery slope.

Further, this error affected the defendant's substantial rights. Texas Rule of Appellate Procedure 44.2(b) provides that a non-constitutional error that does not affect substantial rights must be disregarded. *See* TEX. RULE APP. PROC. 44.2(b). Substantial rights are not affected by the erroneous admission of evidence if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). Here, this court cannot find that the error did not influence the jury or had but a slight effect on the punishment verdict.

The video was played during the State's closing argument, immediately prior to deliberations. The actions in the video were specifically compared to Appellant's actions. The State emphasized that the video was "exactly" what the punishment phase was about and "had everything" to do with the case. (5RR 68, 72). Appellant faced a sentence of 25 years to life in prison, and the jury assessed his punishment at 50 years confinement. The video was inflammatory, immaterial, and affected the jury's punishment verdict. Accordingly, the trial court erred in allowing the State to play the video during closing arguments, and the error affected Appellant's substantial right to a fair punishment hearing. The punishment verdict should be reversed and remanded back to the trial court for a new punishment hearing.

CONCLUSION

It is respectfully submitted that First Court of Appeals erred in holding the trial court did not abuse its discretion in allowing the State to play a video of a lion attempting to maul an infant during its closing arguments in the punishment phase; therefore, this Court should hold the playing of the video was error.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been served on Appellee's attorneys via efile on July 13, 2017:

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CERTIFICATE OF COMPLIANCE

This is to certify that this brief contains a total of 4,750 words, according to the word count on Microsoft Word.

CELESTE BLACKBURN